BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The opinion of the Circuit Court of Appeals, not yet reported, appears in full in the record (Rec. 110-115). No formal opinion has been rendered by the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

Statement of Facts.

The original complaint praying an injunction was filed under the provision of Section 205 of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925), reading as follows:

> Title 50 U. S. C. A. Appendix 925. ENFORCEMENT.
>
> (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliances with such provision and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.
>
> (b) Any person who wilfully violates any provision of section 4 of this Act (section 904 of this Appendix),

and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Offenses under the Act so far as pertinent, are enumerated in Sec. 4, (50 U. S. C. A. 904), as follows:

904. PROHIBITIONS.

(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

This conviction was the outcome of the following proceedings: Complaint (R. 2) was filed in the District Court on February 6, 1943, by the Administrator of the Office of Price Administration against Adolph Lederer and Arthur

Lederer, co-partners, doing business under the firm name of A. Lederer Company. The complaint charged violations of the Emergency Price Control Act, by the sale and delivery of meats at prices in excess of the maximum prices established under the provisions of said Act. On February 18th, a Preliminary Injunction (R. 10) was issued in accordance with the prayer of the complaint, enjoining the defendants, in general language, from selling or delivering meats at prices in excess of the maximum prices established under Revised Maximum Price Regulation No. 169.

An order was entered on August 23d appointing Messrs. Manierre and Johnstone, attorneys for the Price Administrator, to represent the court and to prosecute defendant for criminal contempt (Rec. 20). An order to show cause was also entered requiring defendant to show cause why he should not be punished for contempt for violation of the preliminary injunction by selling meats at prices above the legal, maximum prices. The order to show cause purported to make a part thereof an affidavit on information and belief by Investigator Quinlan (Rec. 22), setting forth the details of transactions investigated by him, and which he charged to be violations of the preliminary injunction.

Neither the Attorney General for the United States nor any of his assistants, nor any United States Attorney nor any assistant participated in any of these proceedings.

The evidence at the trial (Rec. 29-68) consisted of testimony by various customers of defendant to the effect that such customers had purchased meats from defendant and had been charged prices over or more than prices shown on the face of the invoices or bills (Govt. Exhibits, R. 72-87), rendered such customers by defendant, or prices over or more than the "ceiling" prices. There was no evidence whatever at the trial tending to show the establishment of any maximum prices for meats

according to law, nor was there any evidence as to what such maximum prices were. There was no reference of any kind in the testimony to Revised Maximum Price Regulation No. 169, as amended. None of the witnesses explained what was meant by their reference to "ceiling" prices.

SUMMARY OF ARGUMENT.

I.

The Act confers upon the Administration jurisdiction over civil cases and upon the Attorney General jurisdiction over criminal cases, arising under the Act.

Senate Report 931 states this purpose of the Act.

Contempt violations are often more serious than ordinary violations, and hence should not be controlled by a civil official.

Historical consideration of English law and American Federal statutes and decisions supports our contention. *Gompers* v. *U. S.*, 233 U. S. 604, 612, 5 U. S. C. A. 306, 309, 310, 317; 28 U. S. C. A. 485 and 314.

Implied repeal by the Emergency Price Control Act of the many statutes conferring control of criminal cases upon the Attorney General, should not be favored. *Continental Casualty Co.* v. *U. S.*, 314 U. S. 527; *Frost* v. *Wenie*, 157 U. S. 46.

II.

Absence of a charge of wilfulness and specific knowledge is fatal. *U. S.* v. *Carll*, 105 U. S. 611; *Dunbar* v. *U. S.*, 156 U. S. 185; *Garrigan* v. *U. S.*, 163 Fed. 16; *McCauley* v. *First Trust & Sav. Bank*, 276 Fed. 117, 50 U. S. C. A. Appendix 925.

Wilful in the Act denotes evil motive; without this, violations are not criminal. *U. S.* v. *Murdock*, 290 U. S. 389, 397.

A hearsay affidavit on information and belief by a layman, charging criminal contempt, cannot sustain a sen-

tence, especially one for imprisonment for more than a year. *P.* v. *Severinghaus,* 313 Ill. 456; *Denny* v. *State,* 203 Ind. 682; *Conley* v. *U. S.,* 59 F. 2d 929; 28 U. S. C. A. 397.

III.

The sentence was excessive because no reason appears for greater severity than if the prosecution had been by indictment under the Emergency Price Control Act. *Ex p. Hudgings,* 249 U. S. 378; *Ryals* v. *U. S.,* 69 F. 2d 946.

The sentence was not justified by the lower courts' assumptions of fact detrimental to defendant, which were not sustained by the evidence.

This court should announce a rule of moderation in sentences in contempt cases for the guidance of lower courts. *Gompers* v. *U. S.,* 233 U. S. 604, 611; *Ex p. Hudgings,* 249 U. S. 378; *Ryals* v. *U. S.,* 69 F. 2d 946.

IV.

There was no evidence of the establishment of maximum prices under the Act. The word "ceiling" unexplained, is too vague and indefinite to support a conviction of crime. *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293.

The theory of judicial notice does not furnish proof of actual specific knowledge in a criminal case. *Garrigan* v. *U. S.,* 163 Fed. 16; *McCauley* v. *First Trust etc. Bank,* 276 Fed. 117; *Ryals* v. *U. S.,* 69 F. 2d 946.

Especially is this so, where no request is made at the trial for judicial notice; Wigmore on Evidence, Secs. 2568, 2577.

The theory of judicial notice is a rule for the government of courts but does not apply to supply evidence against persons. *Chavez* v. *Times Mirror Co.,* 195 Cal. 20; *Raggio* v. *Southern Pacific Co.,* 191 Cal. 467.

ARGUMENT.

1. The procedure adopted in prosecuting the case was contrary to the terms of the Emergency Price Control Act.

The prosecution of the criminal contempt case by the attorneys for the Office of Price Administration, instead of attorneys for the Department of Justice, was not in conformity with the Act.

The lower court held that the direction of the statute in Section 205 (50 U. S. C. A. 925) that the Administrator may report criminal violations to the Attorney General who may in his discretion cause appropriate proceedings to be brought was merely permissive. However this holding seems to make the Act meaningless on this point. The Administrator, even as a private citizen, is allowed to report criminal violations of any law to the Attorney General. Unless the provision means that the Administrator is to defer to the discretion and control of the Attorney General in criminal contempt matters, as well as ordinary indictment cases, the section adds nothing to the existing law. The word "may" in statutes affecting the public interest, is frequently given a mandatory meaning. *Wilson* v. *U. S.*, 135 F. 2d 1005, 1009; *Supervisors of Rock Island County* v. *U. S.*, 4 Wall. 435, 18 L. Ed. 419.

Thus the lower court's decision defeats the intention expressed in the statute. The Act clearly vests in the Attorney General the discretion and control now claimed and exercised by the Price Administrator over the institution and prosecution of criminal actions including those for criminal contempt consisting of violations of injunctions issued under the Act.

Senate Report No. 931[1] of the Committee on Banking and Currency regarding the Act, states in Section 2, page 8: "The bill also authorizes the Administrator to seek a court injunction against violators of the Act and provides for the punishment of the most flagrant violators by criminal prosecution subject to the supervision and control of the Department of Justice."

The lower court's decision holds that contempts are the most flagrant violations, and that they are punishable far more severely than the strictly statutory offences. Yet the decision allows contempts to be punished without the supervision or control of the Department of Justice. We suggest that Congress, in passing the Emergency Price Control Act, foresaw that its enforcement would cause a large volume of litigation consisting of both civil and criminal cases. Sole discretion over the institution and prosecution of civil cases was given to the Price Administrator. However, in order to keep the institution and prosecution of all criminal cases, including those for criminal contempt, subject to the discretion of the Attorney General, and in order to keep criminal prosecutions under the Act in some sort of reasonable balance with other criminal prosecutions under other statutes, discretion as to the institution and control of the prosecution of criminal cases under the Act was given to the Attorney General.

This is the only logical interpretation of the statute which is consistent both with the Act itself and Senate Report No. 931, *supra*. Our interpretation is also in accordance with the history of contempt. The prosecution of criminal contempt is a criminal case. *Pendergast* v. *U. S.*, 317 U. S. 412, 417. Criminal contempt was formerly prosecuted solely by indictment, and in England that procedure apparently still prevails. *Gompers* v. *U. S.*, 233 U. S. 604, 612; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324,

1. The lower court failed to discuss Senate Report No. 931.

328. The Attorney General and United States Attorney are given jurisdiction and control over all criminal cases in which the United States is a party, and of many classes of civil litigation in which the national government is interested. 5 U. S. C. A. 306, 309, 310, 317.

Under 28 U. S. C. A. 485 it is the duty of "every district attorney to prosecute in his district, all delinquents for crimes and offenses cognizable under the authority of the United States and all civil actions in which the United States are concerned. * * *"

Under 28 U. S. C. A. 314, no compensation can be allowed to any person for services as attorney or counsellor to the United States, or to any branch or department of the government thereof except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered and that the same could not be performed by the Attorney General, Solicitor General, or the officers of the Department of Justice, or by the District Attorneys. In the present case the attorneys who, under appointment of the District Court, prosecuted this contempt, doubtless received compensation there for under the Emergency Price Control Act. Inasmuch as these attorneys were representing the United States in this criminal case, and were not acting as attorneys for the Administrator, their compensation properly should only be paid under the terms of 28 U. S. C. A. 314, which would require a certificate from the Attorney General. However, such certificate would doubtless be unobtainable because the Attorney General could not consistently certify that the services in the prosecution of the contempt case could not have been performed by attorneys for the Department of Justice.

This reasoning clearly indicates that the appointment of attorneys to prosecute the cases, other than lawyers for the Department of Justice, was erroneous.

Moreover, if the District Court could appoint attorneys of its own selection, as here, it could appoint lawyers having no connection with any governmental department and receiving no compensation therefrom. This, of course, would result in having the interests of the government represented by attorneys not selected by and not responsible to, any authorized authority. In such case, moreover, it is quite likely that numerous claims for compensation would result against the United States for services rendered in contempt cases.

The Emergency Price Control Act is a special statute. It confers upon the Administrator and his attorneys special powers and duties which, however, are carefully limited by the Act. Generally, a legislative affirmative description implies denial of non-described powers. *Continental Casualty Co.* v. *U. S.*, 314 U. S. 527.

However, under the decision of the lower court here, the result would be to transfer from the Attorney General and United States attorneys to the attorneys for the Administrator (or any other attorneys selected by the trial judge) the power and duty of the officials of the Department of Justice to prosecute criminal contempt cases in which the United States is a party. In effect, therefore, the lower court's decision is a holding that the Emergency Price Control Act repeals, by implication, the statutes found in 5 U. S. C. A. 306 *et seq.*, and 28 U. S. C. A. 485 and 28 U. S. C. A. 314, above cited.

There is nothing in the language or spirit of the Act, nor in the Congressional Reports expounding the Act's meaning and purpose, which supports the conclusion of the lower court in this respect. Moreover, the rule of law is that repeals by implication are not favored. *Frost* v. *Wenie*, 157 U. S. 46, *Wilmot* v. *Mudge*, 103 U. S. 217. In addition, the rule of interpretation of statutes that when there are two statutes upon the same subject, effect

will be given to both (*U. S.* v. *Borden Co.*, 308 U. S. 188) seems to apply and the granting in the Emergency Price Control Act of control over civil proceedings to the Administrator seems to withhold from him and to effect retention in the Attorney General and United States attorneys of control over all criminal cases. This conclusion, of course, is supported by the express language of the Act itself, above quoted, and by Senate Report 931.

The statute recognizes the fact that a prosecution for criminal contempt is between the public and the defendant therein and is not a part of the cause out of which the contempt arises, *Hayes* v. *Fischer*, 102 U. S. 121; *Russell* v. *U. S.*, 86 F. 2d 389. Accordingly, the usual jurisdiction over criminal cases is here again confined to the Attorney General.

2. The charge contained in the order to show cause is fatally defective in that neither in it, nor the supporting hearsay affidavit is there any charge of wilfulness or guilty knowledge: and also in that the hearsay affidavit, which contains the specific charges, is not under oath as to direct knowledge of the affiant.

The charge against defendant is fatally defective in failing to allege either wilfulness or guilty knowledge.[1] Neither of these are set forth in the order to show cause or the hearsay affidavit (R. 22). The decision of the lower court herein in effect overrules its two prior well-considered decisions in *Garrigan* v. *U. S.*, 163 Fed. 16 and *McCauley* v. *First Trust & Savings Bank*, 276 Fed. 117, in both of which it was held that allegations of wilfulness and actual knowledge were essential.

Moreover, the Emergency Price Control Act itself makes criminal only such violations as are wilful (Section 4, be-

1. The lower court failed to discuss the absence of any charge of wilfulness or specific knowledge.

ing Section 925 of 50 U. S. C. A. Appendix). Failure to charge such an element of the offense is fatal. *U. S.* v. *Carll*, 105 U. S. 611, *Dunbar* v. *U. S.*, 156 U. S. 185, 192.

This is still the law as wilfulness is a constituent element of the offense. The word, when used in a statute prescribing conditions for the conduct of a business, describes evil motive as a constituent element. *U. S.* v. *Murdock*, 290 U. S. 389, 395. A refusal to perform a legal duty is not wilful, though intentional and without legal justification, if based on a mistaken view of the law. *U. S.* v. *Murdock*, 290 U. S. 389, 397. Such at best, is the charge in the present case.

The lower court also omitted discussion of our point that the hearsay affidavit is insufficient to support a charge by a layman resulting in the sentence to imprisonment for more than a year.

Here, again, in logical effect, the lower court has overruled its decisions of *Garrigan* v. *U. S.*, 163 Fed. 16 and *McCauley* v. *First Trust & Savings Bank*, 276 Fed. 117, in both of which it is evident that affidavits on direct knowledge of the affiants were filed, setting forth the charges against the defendants.

The rule seems to be that informations for contempt must be verified on direct knowledge, *P.* v. *Severinghaus*, 313 Ill. 456, *Denny* v. *State*, 203 Ind. 682, and may be made on information and belief only when presented by the United States Attorney. *Conley* v. *U. S.*, 59 Fed. (2d) 929; *Kelly* v. *U. S.*, 250 Fed. 947; *Creekmore* v. *U. S.*, 237 Fed. 743. See also 28 U. S. C. A. 387, an associated contempt statute which requires contempt proceedings thereunder to be instituted "* * * upon the affidavit of some credible person or by information filed by any District Attorney."[1] Direct oath by a layman to the charge he makes certainly must

1. Punishment under this section is limited to a maximum of six months' imprisonment and/or $1000 fine.

be necessary where, as here, punishment as for an infamous crime is imposed upon such charge.

The offense, judged by the possible punishment, is the most serious imaginable, short of treason or a capital offense. The lower court held that the punishment rests solely in the sound discretion of the court, subject only to the constitutional provision against cruel and unusual punishment (R. 113).

3. The sentence was excessive.

We are aware that this Court has held that punishment for contempt may, when the case justifies, be more severe than that provided by the statute whose provisions are also violated by the contemptuous acts involved.

However, we respectfully suggest that in the present case the offense is not *malum in se*, it is not one involving moral turpitude, and there is nothing in the circumstances in the present case requiring a more severe punishment for the act of selling meats at prices above the legally established prices than that prescribed by the Act itself. *Ex parte Hudgings*, 249 U. S. 378.

Congress has indicated an aversion to extremely severe punishment in contempt cases; 28 U. S. C. A. 387 provides for punishment of contempts (similar to that here involved) of not exceeding six months imprisonment and $1,000 fine. This provision should have great weight with judges in imposing sentences in all classes of contempt cases. *Ryals* v. *U. S.*, 69 F. (2d) 946, 948.

Inadvertently no doubt, both lower courts endeavored to justify the sentence by assumptions not supported by evidence. The lower courts evidently fell into the error of accepting as evidence the suspicions and suggestions in the hearsay affidavit of the investigator (R. 22, 25), as to the supposed volume of illegal sales by defendant. As the in-

vestigator did not testify on any point, defendant lost the right of confrontation and cross-examination. The trial court's statement that defendant "collected large sums of money" (R. 70) is without basis in the record,[1] as is also the charge in the opinion of the Court of Appeals that defendant was actuated by avarice and greed (R. 113).[2] For all that appears in the record defendant was conducting business at a loss. Several witnesses attempted to explain conditions affecting the business of purchase and sale of meats but were not allowed to do so by the trial judge (R. 33, 51, 52).

We respectfully suggest that an announcement by this Court, laying down a general rule of moderation in imposing sentences for criminal contempts not aggravated in nature for the guidance of lower courts in similar cases, would be a public benefit. The principle announced by this Court in *Gompers* v. *U. S.*, 233 U. S. 604, 611, seems applicable here, viz. that in dealing with the punishment of crime, if a statute does not cover a case by express words, a rule should be laid down, if not by Congress, by this Court. Congress also intended this Court to have a free hand in regulating the procedure in criminal contempt cases. 18 U. S. C. Supp. II, sec. 689 (Criminal Contempt Rules Act).

4. There was no proof of the establishment of legal maximum prices and no proof that petitioner had actual knowledge of such prices.

There was no evidence whatever at the trial that the Administrator had established any maximum prices for the sale of meats; no evidence of what any such assumed maximum prices were; no evidence that any such assumed

1. Prosecuting attorneys professed ignorance as to the amount of defendants' business (R. 69).

2. There was no evidence whatever of profit to defendant in any transaction.

maximum prices were in force and effect at the times that defendant is charged with selling meats at prices in excess of said assumed maximum prices.

The course of the prosecution at the trial was to exhibit to its witnesses respectively invoices or bills for meats purchased by the witnesses from A. Lederer Company and to draw from the witness a statement that a larger amount was actually paid A. Lederer & Company than the prices shown on the face of the invoices or "ceiling" prices. No witness defined the phrase "ceiling prices."

Courts will not speculate as to the meaning of vague indefinite words, such as "gang", *Lanzetta* v. *U. S.*, 306 U. S. 45; "fair market value", *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, "unfair" and "fascist", *Cafeteria Employes Union* v. *Angelos*, 320 U. S. 293.

The lower court seems to rely here upon the doctrine of judicial notice. The Federal Register Act (44 U. S. C. A. 307) is cited. The Federal Register Act provides (44 U. S. C. A. 307) that publication in the Federal Register of any of the classes of documents entitled to publication therein shall "except in cases where notice by publication is insufficient in law" be sufficient to give notice of the contents of such documents to any person subject thereto or affected thereby.[1] Certainly, mere publication, without more, is not sufficient to fasten guilty knowledge upon defendant or witnesses of all orders and regulations under the Emergency Price Control Act.

Proof of guilt must be beyond a reasonable doubt. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418. In this case there was no proof whatever of the basic fact.

In addition, we submit that the procedure at the trial was not sufficient to justify any Court in taking judicial

1. The lower court failed to discuss this provision of the Federal Register Act.

notice of the alleged maximum prices under the Emergency Price Control Act.

In Wigmore on Evidence, Section 2577, it is said "It can seldom happen that the doing of an official act can be properly noticed; it must usually be evidenced in the ordinary way."

However, even where judicial notice is proper, request therefor should be made in the trial court. In Section 2568 of Wigmore's Evidence, it is said "Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must in point of form, make request for it. Upon this request, the court is bound, it is sometimes said, to declare the fact of notice, or at least to make that investigation which the law declares necessary." *Line* v. *Line*, 119 Md. 403, 86 Atl. 1032; *Amundson* v. *Wilson*, 11 N. D. 193, 91 N. W. 37; *Corbett* v. *Terminal R. R. Association*, 333 Mo. 972, 82 S. W. 2d 97; *Farrell* v. *Employers L. A. Co.*, 57 R. I. 389, 190 Atl. 466; *General Motors A. Co.* v. *Silsby*, 108 Vt. 375, 187 Atl. 575.

The lower court seems to rely also on the general contention that judicial notice will be taken of regulations by heads of the Executive Departments of the Government which are of general public interest. This argument seems inconsistent with the prior reliance on the publication in the Federal Register.

However, there is no discussion by the lower court in either instance of our citation of Professor Wigmore's statements that attention must be drawn, in the trial court, to the matters of which a party desires judicial notice to be taken (Wigmore Secs. 2577, 2568).[1]

In answer to our contention of lack of proof of actual

1. There was no reference whatever at the trial to the Federal Register, nor to the doctrine of judicial notice.

notice by petitioner of the legal maximum prices, the lower court seems also to rely on a series of presumptions. Thus, it is presumed that the trial court took judicial notice of the contents of the Federal Register and correctly analyzed the voluminous matter therein dealing with legal prices for meat. It is then presumed that such legal prices are the prices referred to by the witnesses as "ceiling" prices. It is also presumed that the hearsay affidavit of Investigator Quinlan (R. 25) correctly set forth the legal prices obtained from the Federal Register, although Mr. Quinlan did not testify to the accuracy of his affidavit, or to any other matters; and finally, the lower court presumed that inasmuch as the original prices at which petitioner billed his meats to the witnesses were comparatively close to the prices in the investigator's affidavit (being in some instances above, and in some instances below the affidavit prices), therefore petitioner had actual knowledge of the legal maximum prices.

To the contrary, we respectfully suggest that petitioner's original prices in no instances corresponded with the ceiling prices set forth in the affidavit, and that this fact tends to show that petitioner did not have actual knowledge of the legal prices, and was billing by guess or on unreliable, hearsay information. Moreover, even circumstances raising a strong suspicion of knowledge, are insufficient. *State ex rel. Continental Coal Co.* v. *Bittner*, 102 W. Va. 677.

In its final analysis, the opinion of the lower court seems to necessitate application of the doctrine of judicial notice to the petitioner in order to imply actual knowledge.

However, the rule seems established that the theory of judicial notice is a rule for the government of courts, and has no application to persons. *Chavez* v. *Times Mirror Co.*, 195 Cal. 20, 196 Pac. 666; *Raggio* v. *Southern Pa-*

cific Co., 191 Cal. 467, 195 Pac. 171. Our contention on this point, and the cases cited, received no discussion in the opinion of the lower court.

Conclusion.

In conclusion, it is respectfully submitted that for the reasons above stated, the Writ of Certiorari should be granted.

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